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MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 77-1624

PUBLIC SERVICE COMPANY OF  
NEW HAMPSHIRE,

*v.*

*Petitioner,*

SEACOAST ANTI-POLLUTION LEAGUE ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

**PETITIONER'S SUPPLEMENTAL BRIEF**

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**PETITIONER'S SUPPLEMENTAL BRIEF  
PURSUANT TO  
SUPREME COURT RULE 24(4-5)**

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Following the issuance of the mandate of the Court of Appeals, the Administrator of the Environmental Protection Agency conducted supplemental administrative hearings in accordance with the directives contained in the Court of Appeals' remand order.<sup>1</sup> On August 4, 1978, the Administrator issued his Decision on Remand, in which he reaffirmed his original approval of the petitioner's cooling system.

The Solicitor General has suggested in a Supplemental Brief for the Administrator that these intervening events

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<sup>1</sup> In light of the Court of Appeals' mandate, petitioner is unable to understand the Solicitor General's repeated suggestion that the Administrator somehow "willfully elected" to conduct these additional proceedings.

provide "an additional ground for denying the petition for certiorari in the present posture of this case." Petitioner suggests to the contrary: these events provide further evidence that the petition should *not* be denied.

It should perhaps first be noted that there is nothing "additional" in the Government's newly alleged ground. It is fundamentally indistinguishable from the only argument advanced in the Solicitor General's initial Brief for the Administrator in Opposition. Therein, despite reciting that the Government "do[es] not concede the correctness of the holding of the court of appeals," the Solicitor General urged that the petition be denied because the Administrator *might* again decide in favor of the petitioner's cooling system. That eventuality having indeed come to pass, the only new variation in the Government's theme is its argument that because petitioner might prevail in the review proceeding which has been newly instituted in *the Court of Appeals*,<sup>2</sup> the petition should be denied. This is thus not an "additional ground"; nor is it a meritorious one.

The Government's seeming disregard for the additional expense and burden which further — potentially wholly unnecessary — proceedings before the Court of Appeals will entail is perhaps understandable. More troublesome is the assumption — express in its Brief in Opposition and

<sup>2</sup> The Government originally contended that a second favorable decision by the Administrator would cause the petition to become moot. The Supplemental Brief contains no suggestion of mootness, however; no doubt because the obvious fallacy of that earlier contention has been highlighted by actual events. Predictably, respondents SAPL and Audubon petitioned the Court of Appeals for review, upon substantive and procedural grounds, of the Administrator's Decision on Remand within a few days of its issuance; thereby adding another level of litigation to an already nearly interminable process. Were this Court to grant petitioner full relief, the Administrator's initial approval would be reinstated and petitioner could proceed to construct its nuclear power plant unencumbered by the burdens attendant upon yet another round of procedural carping in the Court of Appeals. Plainly the issues have not become moot.

implicit in its newly filed Supplemental Brief — that petitioner's right to challenge the incorrectness of the Court of Appeals' decision will be preserved notwithstanding denial of the instant petition. More realistically, however, it must be expected that if the petition is denied, petitioner will be met with an argument that the decision of the First Circuit has become the law of the case and may no longer be challenged. Whatever the validity of such a contention, it cannot presently be supposed that denial of the petition may not foreclose further review of the errors in the Court of Appeals' interpretation of the Federal Water Pollution Control Act and the Administrative Procedure Act.

While such foreclosure would undoubtedly severely prejudice petitioner, of perhaps equal importance to this Court is the effect which outright denial of the petition could have in this area of administrative law. The decision of the Court of Appeals for which review is presently sought is one which expands, seemingly infinitely, the potential application of §§ 554-57 of the APA. That expansion appears to be directly in conflict with several recent decisions of this Court. Further, the Court of Appeals' decision is one which even the government respondent does not concede to be correct (although it limply proposes to postpone *its* challenge to some other day). Finally, the Court of Appeals' decision is, both in approach and result, decidedly out of step with this Court's recent reiteration of the limits upon judicial review of administrative decisionmaking: *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

The Court of Appeals' decision — thus both extremely important and extremely dubious — should not go unreviewed by this Court. Certainly it should not go unreviewed on the basis of the specious arguments advanced by the respondents. Post-filing events in this case in no way support a denial of the petition.

These events may, however, indicate that plenary review of the decision by this Court might, *at this time*, be inappropriate. Considerations of judicial economy and a recognition of the finite limits upon this Court's calendar may caution against setting this case down for argument. Where there are to be further proceedings in the Court of Appeals and where that court did not have the benefit of the opinion in *Vermont Yankee, supra*, at the time it reached its earlier decision, the alternative disposition originally suggested by petitioner may now appear to be the better course.

Therefore, in order to preserve the extremely important issues presented by the First Circuit's decision, as well as to give that court the opportunity to reconsider its resolution of those issues, the petition should be granted, the judgment of the Court of Appeals should be vacated and the case should be remanded for consideration in light of *Vermont Yankee*.

Respectfully submitted,

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